



International
Competition
Network

ANTI-CARTEL ENFORCEMENT MANUAL

CARTEL WORKING GROUP
Subgroup 2: Enforcement Techniques

INTRODUCTION
SEARCHES, RAIDS AND INSPECTIONS CHAPTER 1
DRAFTING AND IMPLEMENTING
AN EFFECTIVE LENIENCY PROGRAM CHAPTER 2

Introduction to ICN Anti-Cartel Enforcement Manual

Secret agreements among competitors, often referred to as hard-core cartels, directed at price-fixing, customer allocation, and production output restrictions are the most egregious violations of competition law. In 2004, in clear recognition of the priority that competition agencies around the world have placed on enforcement against hard-core cartels, the ICN established the Cartel Working Group. The aim of the Enforcement Techniques Sub-group (SG2) is to enhance the effectiveness of anti-cartel enforcement through information exchange and fostering of inter-agency collaboration to help competition agencies improve their capacity to combat international cartels. SG2 provides a forum where ICN Members can share their experiences about specific investigative tools, techniques, procedures and practices.

This Manual is a compilation of the investigative approaches used by ICN Members possessing differing levels of experience. Each chapter explores measures employed at various stages of anti-cartel enforcement and identifies approaches that have proven effective and successful.

Competition enforcement systems differ across jurisdictions. In this regard, the Manual does not represent a comprehensive guide for the enforcement of laws concerning hard-core cartels. Rather, it is intended to be a reference tool for agencies to enable them to evaluate their own approaches and to benchmark their experiences against those of their counterparts around the world.

The Manual is a “living” document that may evolve as new technologies and approaches are developed and implemented.



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Chapter
Searches/Raids/Inspections

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1. INTRODUCTION

Competition authorities view searches or raids as one of their most effective investigative tools in the battle against cartels. This chapter, *Searches, Raids and Inspections*, provides an overview of the search and seizure procedures of various ICN member agencies, and identifies some of the key practices that are common among competition authorities around the world.

The chapter is based on information collected from ICN members¹ in July 2004 by means of a questionnaire. The focus of that exercise was to identify good practices and procedures with respect to the organization, timing and conduct of the seizure of documentary evidence. A concise summary of these good practices is listed in Appendix 2.

Best efforts were made to reflect the responses of all the agencies. However, where there is a reference in the Chapter to the number of agencies that engage in any particular practice or procedure, it should be recognized that this may not be a precise reflection of the experience of all the responding agencies. In some instances, usually due to either confidentiality concerns or to a lack of practical experience in the conduct of searches, some responding agencies indicated they could not provide information. In addition, some agencies provided additional information that was not solicited by the questionnaire. Where possible, this additional information is included in the Chapter.

Other sources consulted include OECD reports on investigative tools and techniques to fight hard-core cartels, and proceedings from various international cartel conferences and workshops.

The *Anti-Cartel Enforcement Manual* is a work in progress. The subject of electronic evidence gathering is not addressed in any detail in this chapter. Rather, evidence gathering practices and procedures relating to electronic data will be the subject of a future chapter in this Manual.

¹ The thirty-eight responding agencies are listed in Appendix I

2 DEFINITIONS AND QUALIFICATIONS

2.1 Searches/Raids²

Search and raid are terms variously used by competition agencies to refer to the process of examining and removing records from a premises. For ease of reference, in this chapter 'search' is ordinarily used instead of "inspection" or "raid", and is intended to describe any type of 'on-the-spot' investigation where the agency, police, or other designated enforcement body examines, copies and/or removes relevant paper and electronic records from a premises.

Thirty-two of the thirty-eight agencies that responded to the questionnaire, regardless of the nomenclature employed, define their process in a way that is consistent with this definition. The remaining six agencies use different investigative tools to investigate cartels or have limited search powers.

2.2 Inspection

In this chapter the term "inspection" is used to describe an on-site visit without a warrant and usually, although not always, with either the occupant's permission or advance notice varying between twenty-four hours and ten days. Inspections differ from a search in that the manner and location of inspection may be circumscribed. For example, the agency may only be entitled to request documents rather than actually search for the documents. As with searches, in some instances the type of premises susceptible to an inspection may be limited to commercial and not residential premises.

At least five agencies reported they have the ability to inspect as well as to search. One agency stated it will search rather than inspect whenever there is a risk that the documentary evidence will be destroyed. Another agency reported that it must request permission to "touch any documents or data" when employing its inspection powers. A third agency reported that it may only require the production of relevant documents and an explanation of the documents produced or, if not produced, a statement as to where the documents may be found. Two agencies reported that inspections may only be carried out at the premises of the business (including vehicles at the business premises) and not at private residences.

2.3 Warrant

In this chapter, where searches are effected under some type of advance authorization, the term "warrant" is used to describe the order or documentary authority under which the search is conducted. For ease of reference, "warrant" is used instead of "inspection order", "inspection decision" or "search authorization". Using this definition, one agency specifically identified that its "warrant" is issued by the enforcement agency rather than an external judicial body.

Thirty-one of the thirty-eight agencies that responded to the questionnaire reported they search under the authority of a warrant. One of these agencies reported that it would be required to give advance notice to the business before executing the warrant.

² **Question 1:** If the definition of "search" ("an on the spot' investigation where the agency, police, or other designated enforcement body examines, copies and/or removes relevant paper and electronic records") does not correspond with your authority to search, please elaborate.

2.4 Agency

In this chapter, references to “agency” means the anti-cartel enforcement agency.

2.5 Business

For ease of reference, in this chapter the term “business” means any undertaking, business, company, firm, or association but does not include private residences or vehicles.

2.6 Agencies with Limited or No Search Power

Five agencies reported they have no search power, per se:

- One agency reported that it may ‘audit’ all premises, land or transportation vehicles belonging to a business. The agency commented its legislation does not provide much information about the manner in which investigations are to be conducted.
- Two agencies stated that they rely on other investigative techniques as their primary tools for investigating cartels, including document productions and compelling the attendance of witnesses for examination under oath. One agency reported that it might request its national police force to “check offices, private residences or vehicles.”
- Another agency dispatches investigators “for any necessary on-site inspections”. The investigators may question personnel, but are not authorized to examine, copy or remove relevant papers and electronic records from the premises.
- One agency reported that it can conduct a “field check” at premises occupied by executive bodies, economic entities, the central bank and financial organizations for the purpose of obtaining documents and information necessary for the agency to fulfill its functions.

2.7 Legal Privilege

Five agencies offered definitions of documents protected by legal privilege. These definitions are beyond the scope of this chapter and are not described here, although issues of privilege arising during the conduct of a search or inspection are addressed later in this chapter.

3 SEARCHES VS. OTHER INVESTIGATIVE TECHNIQUES³

3.1 Searching as tool of choice

Most agencies indicated that they use searches in cartel investigations because searches are an effective tool to obtain evidence. The serious and clandestine nature of the conduct, and the possibility that evidence could be altered, hidden or destroyed makes searching the investigative tool of choice, and some agencies reported that they employ this tool as their first means of investigation. Searching is key where the element of surprise is considered to be important to securing the evidence.

Searches are resource-intensive, both in financial and human terms. A number of agencies reported that cost is an important factor when considering whether to search. Nevertheless, one agency reported that searches are the most effective tool in terms of conserving resources and expediting investigations. Seizing documents pursuant to a search warrant gives an agency immediate access to critical materials and, by avoiding delays common to subpoena compliance, some agencies report that search warrants can actually save time and resources. In addition to providing immediate access to key documents, one agency pointed out that searching may increase the likelihood that the agency will obtain all of the documents that it is seeking. The element of surprise provided by the execution of a search warrant reduces the threat that documentary evidence will be destroyed or simply not produced. In addition, some agencies report that, in their experience, search warrants also expedite investigations by grabbing targets' attention and sending a message that the investigation has advanced to a critical stage.

Although searches are the preferred choice for some agencies in cartel investigations, a number of agencies indicated that they use searches only when other tools would be less effective:

- Six agencies reported that the most common circumstance in which they would apply for a warrant is where there exists a suspicion that the business would otherwise not produce the documents and instead would be more likely to conceal, remove, destroy or tamper with them.
- One agency stated that, in deciding whether to employ a search warrant or a without-notice 'visit', it will take into account the level of co-operation expected from the business and whether, if required, the business would produce the documents requested.
- A number of agencies will conduct a search only if other investigative tools would not be effective. Two agencies reported that they must first satisfy a type of "needs" test: that is, whether there are other reasonable and less intrusive means to obtain the information sought.
- One agency is bound by the principle of proportionality: the investigation technique chosen must be proportional to the expected results. Searches will only be taken in cases where the agency already has strong evidence. The agency is concerned that searches may be judged as "fishing expeditions." A second agency takes into account proportionality and strategy, among other considerations.

³ **Question 2:** Under what circumstances is your agency more likely to conduct a search instead of, or in conjunction with, other investigative techniques?

3.2 Searches in Conjunction with other Investigative Techniques

A number of agencies stated that they issue formal requests for information and/or interviews either in conjunction with searches, or at other stages of their investigation. For example, one agency mentioned that written requests for information or documents are sent to entities that are not suspected of having played a role in the cartel. Sometimes - usually towards the end of the investigation - the agency will also send written requests to suspects for information if there are no grounds to believe it would be destroyed or concealed. Another agency will attempt to conduct voluntary interviews at the search site and/or conduct simultaneous voluntary "drop-in" interviews of individuals in conjunction with the search. Two agencies will conduct a search when other investigative techniques have failed and it is believed that documentary evidence may still be found at the business premises.

3.3 Evidentiary Standard to Obtain a Search Warrant

Typically, searches are executed early in the investigation when the investigation is still at the covert stage. A number of agencies reported that before a court will issue a search warrant, they must demonstrate "reasonable grounds to believe" or "probable cause" that an infringement, an offence or other infraction or contravention has been or is about to be committed and that, on any premises to be searched, there are or are likely to be records or other things that will afford evidence of the offence, infraction or contravention. One agency commented that its evidentiary threshold is difficult to meet at the early stages of the investigation when there is frequently insufficient evidence. Consequently, search warrants are not available in the majority of that agency's investigations.

Another agency distinguished the requirements to search a third party not involved in the suspected cartel as being even higher. Searches would only be permissible if the evidence sought *will be* (as opposed to "presumed to be") found at the premises.

3.4 Responsibility for Conducting the Search⁴

Twenty-eight agencies reported they are the entity responsible for conducting cartel-related searches. Four agencies indicated they call on their police force for assistance.

Generally, the search responsibility takes one of the following forms:

- The agency conducts the search alone or, when the agency deems it necessary, with the assistance of police;
- The local, federal or national level agency (depending on the geographic scope of the cartel) conducts the search, in conjunction with a public prosecutor's office (a cooperative arrangement);
- A public prosecutor's office conducts the search, either alone or with the participation of the agency;
- An independent investigative or law enforcement body executes the search warrant with the agency being available to respond to questions from an off-site "command post";

- The Judge authorizing the search exercises control over the search and can inspect the searched location(s) as well as decide when to suspend or terminate the search; or
- The agency has no search powers.

4 ORGANIZING THE SEARCH

It is good practice to first undertake a reconnaissance of the search venue.

Most agencies engage in a planning process which includes identifying the premises to be searched, the type of evidence to be seized, the composition of search teams, and mapping out who will do what and when during the conduct of the search. For this planning process, one or more of the following factors are considered, some of which might entail advance intelligence gathering exercises in respect of:

- the premises to be searched;
- the type of material to be seized including electronic records;
- the profile of the people likely to be at the premises (for example with criminal records checks, firearms registry consultations, etc.) and the resistance anticipated; and
- time zone differences and time schedule for search activities.

4.1 Search Team Composition⁵

It is good practice to consider requirements such as language, gender, and information technology capacity in the team's composition.

Agencies consistently reported that the composition of a search team depends on a number of factors, including:

- the size, location and type of the premises to be searched (a private residence vs. business premises);
- the likely duration of the search;

⁵ **Question 4:** What determines the composition of your search team(s) in terms of numbers, subject expertise and responsibilities?

- the number of employees who are targets of the investigation and who are likely to be at the premises;
- the number of people expected at the premises;
- the complexity of the case;
- the classes of information being searched for and estimates of the volume of documents likely to be found;
- whether or not it is expected that computer records will be seized;
- language proficiency;
- the perceived role in the cartel of the entity being searched; and,
- the anticipated degree of resistance by the occupants of the premises.

Depending on these factors, teams might comprise several members including a team leader, case handlers, police officers (mostly when resistance is anticipated), lawyers, information technology or digital experts, economists, translators, interpreters and other experts.

One agency mentioned that it assigns search team members on the basis of their knowledge of the sector/market that is the subject of the cartel. One agency mentioned that it has a special unit responsible for all cartel investigations including the conduct of any related searches. Another agency reported it appoints external experts such as the police force as authorized members of the agency for the purpose of the search. Another agency mentioned that it composes its teams on a very *ad hoc* basis. One agency reported that for the majority of its searches, the average size of a team is approximately eight persons comprised of 2 or 3 specialist cartel investigators (fulfilling the respective roles of team leader, deputy team leader and site exhibits officer), a forensic information technology investigator, and a “legally qualified case officer.” The remainder of the team is comprised of trained search officers from within the agency’s enforcement branch to assist with the search. The agency also tries to ensure that at least one of the team members is female. A site exhibit officer may be assigned at each premises with responsibility for the collation, recording, bagging and sealing of all documents copied or seized during the search.

Two agencies reported minimum team sizes (three members) while another two agencies reported an optimal team size (five to six persons; and two to six persons, respectively). Most agencies reported that the size of the team(s) is a function of the scope and size of the search. One agency reported that it is not uncommon to have 20 or more officers participating in a search of a corporate office. One agency specified team(s) would be sufficiently large to conduct the search expeditiously but not so large as to make the process unwieldy.

4.2 Role of the Team Leader⁶

It is good practice to appoint a Team Leader who will be responsible for the overall conduct of the search at a premises.

All agencies that conduct searches appoint a team leader who is responsible for the overall conduct of the search at each search premises. Some agencies have pointed out that this person is usually the most experienced officer on the team or the highest ranking official of the team.

The role of the team leader may be summarized as follows:

- presents the warrant (or other authorization) and discusses search procedures with company officials and defence counsel;
- deals with claims of legal privilege;
- co-ordinates the search team and answers questions from the team or corporate representatives;
- liaises between the search team and the corporate representatives and other representatives of the business;
- disperses the search team to secure the premises and monitor key offices to ensure records are not destroyed;
- communicates with the agency and with other team leaders in multiple premises search operations;
- ensures compliance with all statutory requirements and agency procedures (for example that the search warrant is produced upon entry, and if requested by the occupier at any subsequent time, and that all staff carry and display appropriate identification at all times);
- manages the search including allocation of tasks;
- conducts interviews;
- resolves disputes; and
- deals with any claims that the warrant is defective.

⁶ **Question 10:** Is one person designated as the search leader for the premises? If yes, what are his/her responsibilities (e.g. dealing with representatives of the business, lawyers, media, communicating with other search leaders in the instance of multiple premises searches, etc.)

It is good practice, in the instance of simultaneous raids, to plan for a central command post to coordinate the sharing of emerging information and strategies among the search teams and ensure overall consistency of approach.

One agency specified that the person in charge of the investigation will not take active part in the searching activities although he/she will be present on the premises of one of the businesses. Rather, he/she is responsible for “managing” or “orchestrating” the search. Another agency pointed out that the team leader should lead rather than search. His/her role is to ensure that the work is thorough and that all team members are doing what is expected. The team leader cannot lead if acting as a searcher but should keep abreast of what is being found and identify and deploy staff to new areas. Another agency referred to a “supreme” leader, responsible for the whole investigation. Some agencies mentioned that when there are multiple search teams, all team leaders are requested to liaise with a central point back in the office, rather than directly with each other. One agency referred to the establishment of an off-site “command post” where the lead search agents reported.

Four agencies have indicated that the team leader is specifically responsible for drafting a search report, and to report any circumstances preventing the search team from fulfilling its duties.

At one agency, the team leader is responsible for raising the leniency policy at the searched premises and recording any statements, as well as consulting with the home agency concerning any issues that may require an extension or alteration to the warrant, as such decisions require judicial confirmation.

One agency mentioned that the team leader was directly responsible for dealing with media inquiries. Another agency reported media matters related to searches are dealt with by the agency’s spokesperson.

4.3 Search Briefings⁷

All agencies that replied to this question hold briefing sessions prior to the execution of the search. Some agencies prepare a documentary briefing or a written briefing package ahead of the oral briefing. Two agencies mentioned that they make this written briefing package available to the search teams before the oral briefing and identified the benefits of this approach to be:

- staff have the opportunity to familiarize themselves with the overview of the alleged case, the businesses or individuals involved and the classes of items to be searched for prior to the oral briefing; and
- staff can ask questions to clarify any ambiguities at the oral briefing.

⁷ **Question 5:** How are the people who will be conducting the search briefed about the investigation and the evidence sought (e.g. oral or written briefing, individually or in a group)? Please provide any comments you might have as to the benefits/drawbacks of one method over another.

For some agencies, the briefing package is distributed at the oral briefing where the strategic approach is discussed. Two agencies, in addition to the oral and documentary briefings, hold briefings for each individual team to address particular issues or questions that may arise at each specific site to be searched.

Two agencies provide the briefings to the search team on the day before the search for confidentiality reasons. Another agency reported that the success of cartel investigation depends on maintaining the security and confidentiality over the facts, so only a few people are aware of the search plan even within the agency. In that instance, the briefing on the search plan is made in the morning of the day of the investigation or just before launching the search.

4.4 Briefing Contents

A number of agencies described the content of the pre-search briefing. Topics discussed at these briefings include:

- the composition of the team(s) and team leader;
- an overview of the alleged conduct/case/offence;
- the names and descriptions of businesses and key individuals involved in the cartel;
- a description of the location of the premises to be searched and the layout of the premises;
- the type of evidence sought;
- the names and positions of key individuals at the premises;
- the overall search strategy and the procedure to follow, and the role of each team member; and
- any instructions about dealing with the media.

One agency reported that when multiple premises are to be searched, teams are equipped with mobile phones so that they are able to communicate and share information with each other.

Another agency described detailed search briefings to review the premises, the documents sought and the parties involved. At these sessions, the agents are often given maps of the premises and a list of the items to be seized to serve as a quick reference guide during the search. During the briefing agents on the search team are given specific assignments to be performed during the search.

4.5 Note-Taking⁸

It is good practice to make accurate notes of the events and occurrences as they occur at the search premises.

All responding agencies that use searches to gather evidence in cartel cases, except one, prepare minutes, or notes, of all aspects of the search.

Two agencies mentioned that note-taking on a search is important proof that the investigators have conducted the search appropriately, and such notes may become part of the evidence presented in court. One of these agencies commented that such notes may be considered by the courts as more reliable than the investigator's memory.

Twenty-six agencies make notes or prepare a search report or "search protocol" describing one or more of the following elements:

- details obtained during the search briefing;
- time of entry and identification of search officers;
- the fact that all staff (and any other person assisting) carried and displayed appropriate identification (often to satisfy statutory requirements);
- details concerning the presentation of warrant (date, time of day, name of company official, title);
- the fact that the search warrant was produced upon entry (often to satisfy statutory requirements);
- description of the premises searched, including sketch diagrams of all areas searched during the execution of a warrant;
- condition of the premises on arrival and any damage caused to the premises during the execution of the search;
- steps taken to secure the premises;
- any use of outside experts or police;
- detailed notes of relevant discussions with business representatives (discussions of an evidentiary nature, or where making notes is prudent from a risk management perspective);

⁶ **Question 10:** Is one person designated as the search leader for the premises? If yes, what are his/her responsibilities (e.g. dealing with representatives of the business, lawyers, media, communicating with other search leaders in the instance of multiple premises searches, etc.)

- any cautions administered and statements made, word-for-word, if possible;
- discussions relating to the right to consult counsel;
- claims of legal privilege;
- discussions with counsel;
- steps followed in the gathering, seizure, identification and handling of evidence;
- any instance of obstruction;
- condition of seals placed on containers, cabinets, locks, doors etc.;
- condition of seized records left at the premises;
- any significant deviation from established agency procedures;
- details of statements or comments made by any person or events that occur that have a direct relationship to the substance of the investigation (for evidentiary purposes in any subsequent hearing);
- the date, time, location and description of all records seized during the execution of a search and any unique identifying number that was assigned to such records (for evidentiary purposes in any subsequent hearing, and to satisfy the requirements of the chain of custody);
- details of any events that may expose the agency or any of its staff to risk (to satisfy the agency's risk management procedures);
- details of any events that occur that may demonstrate that the subject of the search, or any of its employees failed to provide reasonable assistance during the execution of the search (for evidentiary purposes in any subsequent hearing);
- details of any *prima facie* breach of any legislation not enforced by the agency, or possible breaches of legislation enforced by the agency that fall outside the jurisdiction of the search warrant or substance of the investigation to which the search warrant pertains (so that details can be passed to the relevant enforcement entity or regulator and/or for evidentiary purposes in any subsequent hearing relating to "other" breaches);
- the fact that either a schedule/list of material seized or a notice that records were removed was provided to the occupant of the premises (to satisfy statutory requirements); and;
- the time the search warrant was completed (for evidentiary purposes in any subsequent hearing).

4.6 Designated Note-Taker or Reporter⁹

Responses were divided into two groups:

- Eleven agencies responded that one member on the search team was responsible for taking search notes; and
- Ten agencies stated that all investigators are responsible for taking notes. One agency designates one person to record the presentation of the warrant. Otherwise, each team member takes notes in relation to the part of the premises each is searching. At six agencies, the team leader prepares a written report of the search with reference to other team members' notes. Two agencies reported that two members of the search team take notes and are present during interviews.

5 TIMING

Most agencies replied that, in the case of a multiple premises search, entry is made simultaneously with search teams at other premises to minimize the potential for destruction of evidence.

5.1 Coordination with other Agencies¹⁰

It is good practice, where appropriate, to communicate with relevant foreign competition authorities.

Nineteen agencies responded they either have coordinated the timing of their searches, or have the ability to coordinate with foreign agencies. Eleven agencies responded they either have no experience of coordinating the timing of their searches with other international agencies or do not have the ability to engage in such coordination.

Three agencies referred to a coordinated approach (sometimes informal) with other national anti-trust agencies in the instance of cross-border conspiracies. Four agencies stated that they routinely coordinate with domestic police forces for all searches. Another twenty-six agencies reported coordinating with domestic police forces only when resistance from occupants of the premises to be searched is anticipated.

¹⁰ **Question 6:** In the context of international cartel conduct, do you coordinate the timing of your search with other foreign agencies.

5.2 Advance Notice¹¹

It is good practice to conduct searches with the element of surprise.

Twenty-eight agencies have no obligation to and do not give advance notice before conducting a search. Three agencies mentioned that their reasons for not giving any advance notice relate to their firm conviction that the unexpected nature of the action is of primary importance for the success of the search. Moreover, targets generally are not informed beforehand in order to avoid destruction or removal of incriminatory evidence.

One agency is required to give advance notice and five agencies replied they may give prior notice before conducting a search. One agency provides a notice “not less than 10 days before” the search. One agency stated that if entry is without a warrant, it is obliged to give the occupier at least two working days written notice of the intended entry. One agency stated that when the prosecutor’s office conducts a search, the parties under investigation are informed unless the Court authorizes otherwise.

6 ARRIVAL AT PREMISES

6.1 Entry and Identification

It is good practice to preserve the element of surprise during entry by not disclosing your precise purpose to a receptionist.

One agency reported that its staff carry and display appropriate identification at all times during a search. Another agency indicated that upon initial entry to the premises, the team leader will evaluate the circumstances to determine whether or not to immediately disclose that he/she is there to execute a search warrant. If there is any concern about the security of the records, the team leader may merely identify himself/herself as a government official and ask to speak to the senior executive of the company (the name of this person would have been discussed at the search briefing). Once the person in charge presents him/herself, the precise reason for being at the premises will be made known to the executive in charge.

¹¹ **Question 7:** Are you required to give prior notice to a business before conducting a search of its premises? If so, how much notice and what level of detail is required?

6.2 Presentation of Warrant

It is good practice for the Team Leader to furnish a copy of the search authorization, explain the nature of the search, and caution against obstruction.

Some agencies stated that, once inside the premises to be searched, the team leader presents the warrant to the senior executive of the company and explains the authority of the warrant, the duties of the person in control and the search process. Some agencies also introduce the other members of the search team to the company representative (s). At this stage, team leaders will often ask for a tour of the premises and a description of the responsibilities of the different officials of the company. One agency stated that at this point, the team leader also makes arrangements with the person in charge to have an area, a vacant office or a conference room, to use as a work area for the search team.

6.3 Securing the Premises

Some agencies described the steps that they take to ensure that evidence will not disappear, mentioning that it may be reasonable to restrict access to certain areas of the search premises and seal computers and communication systems, shredders, offices, areas, file cabinets or other containers on the premises until they have been searched. Some agencies reported that they have no authority to seal premises or areas of the premises.

6.4 Requests to Delay the Search¹²

It is good practice, if acceding to a request to delay searching, to first ensure that the premises have been adequately secured so the delay does not prejudice the outcome of the search.

Most agencies replied that they will respect reasonable requests to delay the search until the business has consulted with its lawyer. Such a delay may be granted if it does not interfere with the effective execution of the search, and provided that the premises are adequately secured. Some agencies indicated that this is a question of discretion. Many agencies will grant a "reasonable" amount of time for the occupant of the premises to obtain legal advice, if it is considered appropriate in the circumstances. Some agencies stated that, in practice, they grant between thirty minutes and up to an hour, after which they will proceed with the search.

¹² **Question 8:** How does your agency deal with requests to delay the search until the business has consulted its lawyer?

A number of agencies stated that while businesses have the right to be assisted by legal advisers of their own choice, this right cannot suspend or delay the investigation. Businesses are permitted to consult either in-house lawyers or external lawyers by telephone. However, requests to delay a search until an external lawyer arrives will be refused, especially if there is an in-house lawyer present on the premises.

One agency reported that its standard response to a request for a delay to obtain legal advice is to grant a reasonable time, but to also take measures to secure the premises to be searched and to ensure that no person has the opportunity to remove or destroy material that may fall within the ambit of the search warrant.

Another agency that routinely agrees to a reasonable request for time to consult with a lawyer has, on some occasions, prepared a draft letter in advance for the purposes of passing it to the target's lawyer following formal service of the authorization but before the actual search begins. In this way the business' lawyer obtains a quick and clear understanding of the circumstances and can advise clients promptly.

6.5 Delay Concerns

Some agencies expressed concern that an undue delay in commencing a search could adversely affect the ability to execute the search warrant. These agencies emphasized that the exercise of the right to consult a legal adviser must not unduly delay or impede the search. Any delay must be kept to a strict minimum. The main concern for some agencies is the opportunity a delayed start could provide for evidence to be tampered with or for other parties to a suspected infringement to be warned about the search. To reduce this concern, the search leader may attach such conditions as he/she considers appropriate when agreeing to allow a reasonable delay in order for the party being searched to obtain legal advice. Examples of such conditions include requiring that

- cabinets be sealed;
- business records be kept in the same state and place as when the agency arrived;
- officers from the agency be allowed to enter and remain in occupation of selected offices; and
- the premises be adequately secured.

6.6 Unforeseen Difficulties¹³

In order to minimize the effects a security gate-house or other security system can have on a search, several agencies noted that they conduct a covert pre-search reconnaissance of all premises to identify security routines, entry and exit routes and work out the number of staff needed for the task before the search begins. This allows for risk assessment and deployment of staff to cover those risks. One agency stated it made note of any impediments to gaining entry (such as security measures) and built contingencies into the search warrant execution plan and staff briefing. This may include confidential approaches to security

¹³ **Question 9:** How do you prepare for or respond to situations where a surprise entry to the premises being searched is prevented by virtue of a security gate-house or other security system(s)?

organizations to have their staff on standby to facilitate entry. An example of this might be to disable a monitored alarm system, or to provide the appropriate tools to facilitate entry. This will include the use of force if necessary.

Some agencies described a two-step process to gaining entry in the face of impediments. As a first step, the team leader will identify him/herself and ask to speak to the individual in charge. When the person in charge is present, the team leader will provide that person with a copy of the warrant and ask permission to enter the premises to conduct the search. In the case of resistance or refusal, or if permission is not readily given, agents will use forcible entry with police assistance so as to eliminate the possibility of evidence being destroyed. Some agencies reported that impeding entry may be considered obstruction and be fined accordingly.

One agency mentioned that it can carry out a search in the absence of the occupier or owner of the premises, but must leave a notice in a prominent place at the premises stating the date and time the search warrant was executed, the name of the person who executed the warrant and the fact that material was removed from the premises.

7 CONDUCTING THE SEARCH

7.1 Limiting Company's Access to the Premises or Detention during a Search¹⁴

No agency mentioned having the power to restrict the movement of persons during a search. A few agencies stated that while corporate representatives are not required to assist with their searches, interference with the search could result in their being removed from the premises and/or arrested and charged with obstruction of justice.

Many agencies reported that they take measures to control offices considered strategic to the search operation by giving search priority to important areas and offices of key personnel and securing the offices by sealing documents, cabinets or entire rooms. Along with sealing, different approaches to control the premises and the integrity of the search operation upon entry were described, including:

- accompanying key individuals during the early stages of a search to ensure they cannot interfere with documents or ask someone else to do so;
- asking people to leave certain rooms and/or situating investigators in rooms where relevant documents are housed to ensure preservation of the documents;
- unplugging or sealing shredders;
- requesting key individuals of the business to remain at the premises and to collaborate with the search officers in order to hasten the search operation;
- requesting employees at the premises not to move documents on desks or remove files from drawers until after the search has been completed;

¹⁴ **Question 11(b):** Under what circumstances and how do you limit access by the management and employees of the business to all or part of the premises and/or documents?

- identifying the rooms, computers and documents to be searched, after which the occupants are forbidden to make any changes to them until the search of the specific room, documents or computer is finished;
- advising the occupants of areas of a premises being searched that they are not permitted to continue to work on their computer, and requesting those persons to first seek clearance from a member of the searching agency if they require access to any documents located in that area;
- requesting the searched party to discontinue the removal of records to offsite storage;
- advising the occupants against acts of obstruction; and
- sealing areas and storing documents in a secure place when the search cannot be completed in one day.

7.2 Arrests and Searches of Individuals¹⁵

It is good practice, where permitted, to ensure the search authorization covers moveable objects such as briefcases, handbags, electronic diaries, and portable computers.

No agencies reported having the power to arrest individuals in order to search for records on their person (i.e. briefcases, pockets, etc.). Seven agencies stated that either they or police officers attending the search are authorized to search each person present or each person leaving the premises who is suspected of hiding relevant documents. Ten agencies responded that they would request key individuals wishing to leave the premises to produce any documents/ diaries/agendas on their person before leaving. One agency reported its officers do not have the right to search for records on the person. However, if that person removes a document and tries to hide it during the search, the officer is allowed to take it back from the person, unless the record was already on the person before the search began. Two agencies reported having the authority to search briefcases and similar articles found at the premises. Other agencies may be able to search individuals, briefcases, etc. under certain conditions, which vary widely, as follows:

- There is “reason to believe” that a record specified in the warrant would be found in the briefcase, etc.

¹⁵ **Question 11 (c):** Does your search authority permit you to search for records on the person before they leave the premises (i.e. briefcases, pockets, etc.)? If you have this authority, how do you carry it out? If you do not have this authority, what precautions do you take to minimize the removal of records on the person?

- The information to obtain the search warrant specifies that the locations to be searched include briefcases, laptop computers and such other movable document containers located at the premises in the possession of, or readily identifiable as belonging to specific individuals identified in the search warrant.
- The warrant holder (usually the search team leader) has reasonable grounds to suspect that an individual has, on their person, documents, articles or things covered by the search warrant and that individual refuses to hand them over for examination. In such circumstances, that individual may be in breach of the requirement to provide all reasonable assistance and may face prosecution for their actions.
- The individual has given his/her consent.

7.3 Taking Statements During the Search¹⁶

It is good practice to ensure that a strategy is in place as to who will conduct the interviews, and that complete notes are made of the interview.

Seventeen agencies stated they take statements from management and employees of the business during the search, including any clarifications provided in response to questions from members of the search team. One agency records statements taken during a search on tape and in written form. Some agencies indicated that they conduct interviews whether or not consent is required.

At least four agencies have their search report signed by an official from the agency and from the business being searched. One agency requires that any explanation of the alleged conduct be written down and signed by the individual who provided the information, including a statement to the effect that the individual has read the statement and acknowledges it to be a true statement in his/her words. Another agency responded that the statement-giver is under no obligation to sign the statement and can also “announce their different opinion.”

Agencies described many different practices with respect to interviewing or questioning management and employees at the premises during the conduct of the search. A number of agencies question individuals at the premises, but only for the purpose of assisting in the conduct of the search. For example, individuals may be questioned for the following reasons:

- to assist in the identification of the locations of relevant documents and for explanations of written entries or symbols in documents such as calendars; or

¹⁶ **Question 11 (a):** Do you interview or question the business’s management and employees at the premises about the substance of the investigation? Why or why not?

- to assist with the search, e.g. By providing the combination to a locked safe or to explain documents, e.g. initials and acronyms.

Some agencies answered that they will attempt to conduct voluntary interviews knowing that the subject may refuse and/or be protected against self-incrimination. Of these agencies, three usually have their officers request voluntary interviews with management and employees of the business during the conduct of a search, although the individuals need not agree to answer questions. A fourth agency reported that it routinely conducts interviews during a search and takes statements from the management and employees of the business regarding their activities or documents that are deemed relevant. The business must be provided with a copy of the recorded statements, but only after the search is completed. A fifth agency views interviews of management and employees during a search to be a fast way to get more relevant information about the investigation. One agency reported that it cannot question employees of the business but may question the legal representatives/lawyers at the search site regarding the subject of the search.

Some agencies reported that they do not interview any person in relation to the substance of the investigation during a search, with the following explanations:

- Given the inherently intrusive nature of searches, it is not uncommon for emotions to be at the extreme end of the scale such that it is usually neither appropriate nor wise to formally interview the party being searched.
- The statutory requirement for the occupants of a premises to provide all reasonable assistance to the agency during the search does not extend to answering any questions. Occupants may not be aware of their rights and consequently any answers they provide could later be ruled inadmissible in court due to a perception of unfairness. To avoid any subsequent problems, agency staff will generally conduct formal interviews at a later time, unless such delay might prejudice the investigation.
- Statement-taking during a search can distract from the search such that there is a preference to consider the documents obtained, and other information gathered during the investigation, before seeking statements from the management or employees of the business.
- Interviews will not be conducted due to the agency's limited personnel resources. However, the agency informs the parties about the existence and provisions of the agency's leniency policy, informs them of their rights, and gives them the opportunity to make a statement. Statements are recorded in writing and approved by the person making it.
- If management is willing to cooperate with the investigation, the agency can always contact them later.

7.4 Photographs and Videos¹⁷

The majority of agencies reported they have the power to take photographs and/or video footage at the premises during the search. However, very few agencies indicated they actually do so. A few agencies responded they had no such powers.

Two agencies routinely take pictures or videotape at a search location. One agency stated that it does so to document the state of the premises, and to rebut any subsequent claims that the premises or property was damaged during the conduct of the search. This agency noted that pictures can also help to document the location of evidence at the search site for identification and chain of custody purposes. A third agency stated that it takes videos or photos, not as a matter of course, but in circumstances where the premises were in poor condition upon arrival. It would record in detail the type of photo or video equipment used, the type of film, the number of frames, and the date and location. In the case of videotaping, these details could be either written or audio recorded.

7.5 Scope of Search

One agency stated that the area it is allowed to search is strictly limited by the wording of the warrant. For example, if the warrant refers to a certain suite number, the warrant would not confer the authority to search multiple suites occupied by the entity being searched, even if the suites were adjacent to the suite specified in the warrant. In order to search adjacent suites, agents would be required to obtain a new search warrant.

7.6 Sensitive Areas (such as Private Residences, Law Offices, News Media, and Vehicles)¹⁸

It is good practice, when resources permit and having regard to the nature of the premises to be searched, to include both male and female personnel on search teams (particularly when a private residence is to be searched).

Most agencies reported that in addition to business premises, they could search one or more other types of premises, such as private residences, vehicles, lawyers' offices, and the news media. Most agencies indicated that searches of these types of premises give rise to special considerations and procedures. One agency commented that extra caution should be taken in the case of residential searches and particular consideration should be given to who may be on the premises at the time, e.g. unsuspecting family members. One agency will consider confining the area to be searched within a private residence to a

¹⁷ **Question 11 (d):** Under what circumstances, if at all, do you take photos or videos on the premises?

¹⁸ **Question 12:** Are you permitted to search other than business premises (e.g. private residences, lawyers offices, vehicles, etc.)? If yes, please describe any different procedures or considerations in conducting searches of such locations.

defined area but in reaching this decision, the agency takes into account the possibility that incriminating records might be located in unexpected places.

Although standards varied according to each jurisdiction, agencies commonly reported they would first be required to show some indication that an infraction, contravention or a crime had been committed and that evidence of that infringement would be located at the premises. One agency indicated that, to obtain a warrant for sensitive locations, the agency would have to establish to a higher standard that relevant documents would be found at such premises. Almost all agencies mentioned that a separate warrant or authorization would be necessary.

Three agencies reported they could search private residences only with the consent of the occupant. One of these agencies reported that, in the face of a refusal by the occupant, the agency could not proceed with a search but the uncooperative occupant could face an administrative fine.

One agency reported it can search vehicles located at the premises identified in the warrant, provided that the records described in the warrant could reasonably be found in the vehicle, or provided the vehicle is specifically mentioned in the warrant or comes within the description of the premises. Another agency is permitted to search vehicles parked in the business' car park provided the agency has a warrant to search the business. Vehicles parked elsewhere require a separate authorization and are subject to the 'reasonable suspicion' test and a separate warrant.

Another agency reported that as a result of a court decision it could search vehicles, uninhabited rooms, buildings, apartments and other premises or movable properties belonging to other persons but only if the police are present.

Another agency reported that it is more difficult to obtain a warrant for sensitive places such as a lawyer's office, and a warrant for such a premises may include specific conditions on the mode of search in order to safeguard privileged or irrelevant material. One agency conducts searches of lawyers' offices in the presence of a representative from the lawyers' bar association and upon notice to the district committee of the bar association.

7.7 Unauthorized Removal or Destruction of Records¹⁹

It is good practice to ensure that the search team has the power and has been trained to respond to unauthorized removal or destruction of records.

Most agencies consider attempts to remove material from a premises, or to destroy a record before the searching officer has an opportunity to examine it, to be an obstruction of justice.

In the face of such conduct, a number of these agencies follow a two-step approach consisting, first, of some form of warning, and second, by a possible charge of obstruction. Some jurisdictions also require intervention by the police.

Two agencies reported they treat the removal or destruction of records during a search as a refusal to cooperate. One agency considers non-cooperation as an aggravating circumstance allowing the agency to increase the amount of the sanction sought. The other agency indicated it usually would issue a fine for non-cooperation, although in exceptional circumstances it would call upon the police for assistance.

Only one agency indicated that it has no power to respond to the unauthorized removal or destruction of records, physical interference, etc. during the conduct of the search.

7.8 Evidence of Offences not Covered by the Warrant²⁰

It is good practice to ensure the appropriate resources are available on a stand-by basis to aid the search team if necessary (e.g. legal counsel, supplementary search officers, officer to draft additional search authorizations if necessary).

Procedures to deal with evidence of other offences found during a search (whether competition-related or not) that are not covered by the warrant vary greatly among agencies.

7.8.1 Other Competition Offences

Two agencies responded that if, during a search, officers inadvertently come across evidence of another competition infraction, it might be legally possible to seize it under what is known in those jurisdictions as the “plain view doctrine”. One of these agencies uses this approach in exigent circumstances, when there is no time to obtain a new search warrant and there is a risk that the evidence will be removed or destroyed. However, in the absence of exigent circumstances, the agency is required to obtain another search warrant. The second agency will try to obtain another warrant on the basis of “probable cause to believe” that the additional crime has been committed and that evidence of that crime will be found at the premises. A third agency would have its search team leader make contemporaneous

²⁰ **Question 15:** What do you do if you find evidence of other offences (whether competition-related or not) that are not covered by your authority for the search?

notes of such evidence and once back at the office, the case team will consider internally if there are grounds for making further enquiries or for taking further investigative action.

Other agencies reported that they would seize the records of another competition offence notwithstanding that their warrant relates to either another product or offence. Two agencies reported they are empowered to take copies of documents that are not covered by the warrant when such documents happen to be discovered in the course of the search (i.e. without being deliberately sought) and constitute evidence of an infringement of competition rules. This is particularly the case where such documents provide further elements as regards the actual scope of the suspected infringement (for example in terms of its duration and/or geographic dimension, the number of businesses implicated therein, or additional products covered by the cartel activity under investigation). Another agency reported if such documents are found during the course of a search, the agency can copy or take them, and use them to either expand upon the existing investigation or launch a new one. One agency reported that it would seize the evidence but if the business contested the seizure, the documents would have to be returned to the business.

7.8.2 Non-Competition Offence

A number of agencies stated they neither have authority to use evidence of other offences (whether competition-related or not) that are not covered by search warrant nor to transmit it to other agencies. One agency specified it is bound by professional secrecy and information collected by its personnel can only be disclosed to other agencies if a public interest can be established. Another agency reported it will exclusively report offences when it has a legal obligation to do so, i.e., offences against life or the 'royal dignity' and offences by civil servants.

Other agencies will seize documentary evidence relating to a non-competition offence and refer it to the proper agencies including, for example, the national competition agency, tax agency or police. One agency stated that it would seize the documents based on its domestic legislation mandating civil servants to inform each other of information that comes to their attention during the exercise of their functions. Another agency stated that it is compelled to inform the competent entities about the fact or document found during the search. A third agency will submit a report to the Court describing the alleged offence. Another agency deals with evidence of other offences found during a search by having the team leader make a note of such evidence in his or her contemporaneous records and, on return to the office, he or she will decide if any other agency needs to be informed, for example, the police.

7.9 When to Stop Searching

One agency reported that its officers will stop searching and vacate the premises if any of the following conditions occurs: the warrant expires; all the things described in the warrant are either found or are not at the search premises; or the search officers are served with a court order requiring an end to the search. Another agency described its general approach to searching as leaving no place unexamined, with the reminder that even waste paper baskets can be fertile locations.

8 CLAIMS OF LEGAL PRIVILEGE²¹

This section deals with attempts by lawyers, either inside or outside counsel, to pre-examine the records on the premises, in advance of the search team, in order to determine whether or not the records to be examined by the searching officers fall into the category of documents covered by legal privilege. The most common argument voiced by these lawyers is that the privilege may be lost if a third party (namely, a search officer) has access to such documents.

One agency stated it offers the opportunity to the occupant or the occupant's legal advisor to identify immediately any files or documents known to be privileged in order that it can be sealed for subsequent resolution of the claim by the court. The team leader will also explain to the lawyer that further opportunity to make a claim of legal privilege will be afforded to the occupant or his legal representative before any records are removed from the premises. If, at the search site, the occupant or the occupant's legal advisor persists and attempts to pre-screen records by claiming privilege over all records at the premises, the team leader will refer them to the part of the agency's legislation that details the offence related to impeding an inquiry and will also explain that in the event they wish to claim privilege over all the records at the premises then the records (including computers) will be boxed, sealed, and transported to the court for resolution of the claim.

Three agencies responded they had no such concept as legal privilege.

8.1 Procedure for Handling Claims of Legal Privilege

Nine agencies indicated that privilege claims could be made, but either provided no procedures for addressing such claims, or indicated that their procedures are being developed. Twelve agencies described different procedures with respect to claims of lawyer-client privilege during the conduct of a search. These procedures may be grouped as follows:

- Six agencies reported that their officers may browse or partly browse the documents before making a determination whether the privilege should apply in the circumstances.
- Four agencies reported that documents are sealed and the determination is made by the Court.
- One agency reported that it avoids searching areas at the premises where it is anticipated such privilege claims would or could be made.
- One agency relies on independent lawyers to resolve privilege issues.

Some examples of the procedures within each of these groupings are elaborated upon below.

8.1.1 Allowing Officers to Browse or Partly Browse the Documents Before Making a Determination

At least six jurisdictions noted that they could browse or partially browse the documents in order to assess whether the documents are privileged. Four of these six agencies stated

²¹ **Question 14:** How do you deal with claims of lawyer-client privilege during the conduct of the search?

they browse documents to verify privilege claims. If the documents are not overtly privileged, the agency will ask the business to explain why the document should be categorized as legally privileged. This might be effected by browsing parts of the document, such as the letterhead, to determine if the document emanated from the business' external legal advisers. Any disagreement as to the status of these documents may be resolved by the Courts.

8.1.2 Documents are Sealed for a Determination by the Court

Four agencies commented that, when privilege is claimed over any documents, such documents will not be examined or copied by the searching officers unless an agreement can be reached with the business to do so. If no agreement is reached, then each jurisdiction applies its own procedures variously as follows:

- On the day of the search, the team leader will request that the business make a copy of the privileged documents and, in his/her presence, place the documents in a sealed envelope. The team leader will then request the legal adviser of the business to give a written undertaking that the envelope or package will be retained safely and that its contents will not be concealed, removed, tampered with or destroyed until the issue of privilege is resolved.
- When a question concerning the seizure of confidential documents is raised, those documents are sealed in an envelope and are brought to a judge for a ruling.
- When a claim of privilege is made, the officer must place the record, without examining it or making a copy of it, in a package and seal and identify the package. The package must be kept in a secure location, for example, a company safe or secure file cabinet, for the remainder of the search. Upon completion of the search, the package is placed either in the custody of the Court or another specified person agreed upon by the officer and the person making the claim. The officer should turn the package over to the custodian within twenty-four hours of the completion of the search or, if that is not feasible, at the first available opportunity, and thereafter the person claiming privilege has thirty days to bring an application to the Court for a determination.

8.1.3 Dealing with Claims of Legal Privilege by Avoiding Likely Areas

One agency requests that its agents make every effort to avoid seizing documents that appear to be privileged. The agency will not usually entertain assertions by counsel during a search that certain documents are privileged. If there is reason to believe that privileged documents are located in certain areas of the premises to be searched, agents will avoid searching those areas. The agency is in the process of developing a procedure to ensure that, post-search, agency staff do not inadvertently review privileged documents and that documents which are clearly privileged are returned. The agency sometimes gives counsel for the subject company a specified number of days in which to review seized documents and designate documents they assert are privileged and then the agency works with counsel to resolve privilege issues.

8.1.4 Use of Independent Lawyers to resolve Claims of Legal Privilege

One agency reported that it relies on independent lawyers to resolve claims of legal privilege, summarizing its procedure as follows:

- Prior to commencing a search of any area, the occupant is asked if there is any material located in that area that the occupant considers privileged. If the occupant does not understand the concept of privilege, an explanation, including a brief description of the types of records that may attract such privilege, will be provided.
- Any material identified by the occupant as privileged is immediately placed in a container and sealed. It is not viewed or commented on by the searching officer.
- At the completion of the search of the business or residence etc., the occupant is offered two options:
 - 1) an independent lawyer that is acceptable to both parties can be asked to go to the premises, review the documents over which privilege is asserted, and render an opinion as to whether or not privilege may apply; or
 - 2) the records are sealed and delivered to an independent lawyer for an opinion whether or not privilege applies to any or all of the documents.
- If neither of these options is agreed to by the business or occupant, option two is instituted by the search team leader.
- Any records that the independent lawyer considers to be privileged are immediately returned to the business or occupant and under no circumstances are viewed by any agency staff member.
- Records that the independent lawyer considers are not privileged are given into the custody of the agency, unless the business or occupant disputes that opinion. If there is opposition to the opinion, the agency (in conjunction with the business or occupant or independently) will apply to the appropriate Court for a ruling on privilege.

9 SEIZURE

9.1 Selection, Examination and Seizure of Records²²

Most agencies described a two-step procedure to select the documents to be seized. First, an initial selection of documents is made on the basis of being enumerated in the warrant. A final selection is completed on the basis of relevancy. A number of agencies do the preliminary selection during the search and the final selection at the agency. At least one agency performs both steps at the premises.

²² **Question 16:** Do you follow a particular process when selecting records to take from the premises and if so please describe (e.g. Initial triage followed by final selection, etc.)

One agency described its procedure in detail. According to this agency, the description of records listed in the warrant serves as a guideline for the preliminary selection of records to be seized. Given that at the initial selection stage it is often difficult to determine relevancy, the agency will first select records that seem relevant but will, during a secondary selection, reject some of these documents as irrelevant. A "Location Identifying Note" (LIN) is affixed to the record or group of records as they are selected by the search officer and the records are then placed in an expandable folder. The LIN includes information about the precise location where each record was found (e.g. 3rd drawer of desk in file labeled "Sales Report in office of Ms. X, Sales Manager), as well as the search officer's name and the date the document was selected. Each expandable folder is identified in terms of the area searched (e.g. Office of Mr. X, President or Ms Y, Accountant, etc). Each time a new office or area is searched, a new expandable folder is used as a temporary repository for the preliminary record selections from that area. Once the search of that area or office has been completed, the folder is sealed and placed in a pre-determined secure area and the officer will proceed to search the next assigned area. Further examination and culling of records is done during the secondary examination at the search team's work area at the premises being searched. Records that are deemed not to be relevant during the secondary selection, or culling phase, are returned to the office from which they were initially selected. The secondary, or final selection of documents to be seized, is usually done by the search team leader who will have the advantage of looking at all the records. The team leader also ensures that all selected records fall within the scope of the warrant and can therefore be seized.

Another agency follows a specific procedure in identifying the selected documents. The agency notes the time and place of the seizure of the document as well as a description of the document. Information about the person working in the relevant place of the seizure and other identifiers may also be included in the note or protocol. If it is possible, documents are copied and the copies seized. Originals are seized when the search team does not have the means to copy documents at the premises (for example, if the business refuses to allow its own copying equipment to be used). It will be noted in the protocol whether the original was seized or a copy taken.

A third agency reported that its search warrants stipulate the classes of material sought under the warrant. For example, a search warrant may refer to 'correspondence between XYZ (Country A) Ltd and XYZ (Country B) Ltd relating to contract arrangements with third parties' or 'agendas, minutes or other documents that indicate an agreement may exist between competitors as to the price at which goods or services will be bought or sold'. The "classes" of material sought are also detailed in the written and oral briefings to search participants. Staff are required to conduct an initial triage at the search scene, and to conduct a further, more detailed, analysis at the agency's office.

Many agencies stated that they seize a photocopy of the final selection of documents and leave the original documents at the business. One agency reported that it may seize excerpts of documents. In its procedure on document selection, the agency will identify relevant documents, prepare a list of all documents, and then make copies or obtain excerpts of the documents.

One agency stated that it does not follow a particular process; it may vary on a case-by-case basis. This agency usually knows in advance the type of documents it is searching for – at times it knows the specific documents it seeks.

9.2 Coding and Other Forms of Document Identification²³

It is good practice to ensure that documents seized during a search are duly coded by means of affixing an identifier to each document seized.

Ten agencies indicated that they affix some type of unique identifier to the seized documents. Six agencies record a number on the documents along with a description or a list of the seized material. Ten agencies employ other methods. Thirteen agencies specified that coding was done at the premises during the search. One agency stated that if a large quantity of documents is seized, the files are marked at the business premises and the rest of the documents are marked at the Agency.

9.3 Alpha Numerical Identifier

Two agencies indicated they use the agency's Exhibit Label or stamp to enter the alpha-numerical identifier. Other agencies reported labeling or coding their documents using a combination of the initials of the officer conducting the search, the name of the entity searched, or a unique alpha code with a serial number. Some of these agencies also make a list of the documents seized, or make note of the particular location the documents were found. This procedure includes such steps as:

- Each document is labeled according to the initials of the officer conducting the search and the number of the document found in a certain room (e.g. ABC1, ABC2, ABC3). A list of documents is compiled consisting of the room where the documents were found, the full name of the officer conducting the search, and a brief description of the document (e.g. ABC1: An e-mail from John Doe to Jane Doe dated 5-5-2004).
- When selecting a record, the officer affixes a "Location Identifying Note" (LIN) to the document. Each LIN contains the following information concerning each record or group of records found at any given location:
 - 1) the office or general area where the record was found (e.g.: Mr. X, VP Sales);
 - 2) the exact location in that area or office where the record was located, i.e. filing cabinet, desk, credenza, box, etc;
 - 3) the file name in which the record was found;
 - 4) the name of the selecting officer and her/his signature;

²³ **Question 17:** Do you code or use other means to uniquely identify records being taken from the premises? If yes, please describe, including indicating whether this is done at the premises or upon return to the agency.

- 5) the alpha numerical code (ABC 001 to ABC 004) of the record (with the alpha portion being uniquely identified to the premises searched);
- 6) the name of the coding officer and her/his signature; and
- 7) any relevant comments.

9.4 Numbering and Listing Seizures

Six agencies reported that they number and list their seized documents. For example,

- one agency writes the number on a sticker which will then be attached to the records.
- some of these agencies list or describe (including where it was found) the seized documents. One of these agencies has the list signed by the business representative as well as by the team leader.

9.5 Other Methods

One agency stated that it places its records in plastic bags, on which labels are affixed to identify the original location from which the records were removed. Another agency assigns numbers to the rooms searched at each premises and marks them on a floor plan of the premises. Boxes of documents are usually identified with a box number as well as the room number from which they were taken. One agency reported that it is moving to bar codes to identify seized documents and another agency reported it uses bar codes, with the details of the document and the place where it was located being recorded against the bar code. Two agencies reported using the seal of the agency to identify the documents. One agency also marks serial numbers on documents seized.

Two agencies reported they describe or list the records in a protocol prepared at the premises of the business and signed by its representatives. One agency reported placing the documents in special files for seizure. Another agency does not code or uniquely identify records, but organizes the records in a way that can be traced.

9.6 Continuity of Possession²⁴

The responses described two distinct approaches to preserving the chain of custody and continuity of possession of documents during a search. These approaches vary according to the type of legislative regime applicable to cartels in particular jurisdictions. All jurisdictions with a criminal enforcement regime described a procedure used to preserve the chain of custody of documents during the search. A large number of agencies responded that, as their competition regimes are administrative, they do not require procedures to ensure continuity of possession.

²⁴ **Question 19:** If applicable, please describe the measures you take to safeguard the chain of custody or continuity of possession over the records you select both during and after the search.

Four agencies responded that they appoint an evidence or document custodian to record the chain of possession of the original documents during the search. The various procedures for doing so are summarized below:

- Continuity of possession begins at the point of preliminary selection. To make seized records useful for legal proceedings, a complete chain of possession must be recorded in order that one is able to say that the record tendered is the seized record. One must be able to attest that the record is in the same condition as it was when seized, that is to say, unaltered. Similarly, if copies rather than the original records are seized or retained, an officer must be able to say that the copy is a true copy of the record and that, when copied, the record was not altered from its seized condition. The records must be secured from the time of selection until they are copied. True copies must be kept secure until they are filed as evidence. From the time the original documents are selected for further examination, they must be kept secure in one of the following ways:
 - 1) the original documents must remain in the possession of the searching officer;
 - 2) the original documents must be in the view of another officer; or
 - 3) the original documents must be placed in a sealed container with the seals remaining intact thereafter.
- Each member of the search team remains responsible for his or her documents throughout the course of the search until the documents are handed over to a site exhibits officer who places them in a plastic bag, which is then sealed. That bag is not opened until the officers return to the office. The agency operates a document handling system that is intended to preserve the chain of custody from the moment a document comes into its possession through to the conclusion of the investigation.
- An officer is designated as the evidence custodian in each search. He/she is responsible for maintaining the document log and also for ensuring that it is kept in the appropriate evidence locker during the search.

The majority of agencies that answered this question stated that they have no specific procedures for taking copies of documents. For these agencies, document copying procedures are administrative and the chain of custody issues which arise in criminal regimes are not applicable. Agencies that have procedures to copy documents variously described them as follows:

- The authenticity of the records is safeguarded by the agency taking only copies of the documents selected during the search. The agency makes two copies of the records it selects under the warrant. The agency retains one of the copies and leaves the other copy as well as the original documents with the business. If subsequent claims concerning the authenticity of the documents are raised, the agency will compare the copies taken from the premises with the duplicate copies given to the business. To this date this method has been sufficient in maintaining a credible chain of custody and continuity of possession of evidence.
- The search team leader as well as the lead case investigator has custody of the documents until the documents are exhibited as evidence in Court or until the case ends.

- When conducting a search, investigators of the agency request that a representative of the business be present at the search, and order the representative to submit the records with an identified seal or with serial numbers to identify the source of the records.
- During the course of the search, the search officers may examine, obtain copies or take extracts from books and documents and, if necessary, retain them for a maximum of ten days.

Three agencies described the further procedures they follow to maintain the integrity of the documents after the documents have been seized. One of these agencies controls access to original documents by designating a documents custodian who, whenever possible, controls access to original documents; handles copies instead of originals; scans documents for viewing on computers; and makes copies of seized computer images or drives. Another agency attaches a complete exhibit label to all material seized. This information must be noted in the investigator's notebook. The agency's exhibit list has a space for the recording of any movement of exhibits, including the unique identifier, the name and signature of the person releasing the exhibit, the name and signature of the person receiving the exhibit, and the reason for the change of custody. Furthermore, this agency and many others who responded to this question have dedicated secure exhibits rooms, with entry controlled and restricted by the agencies' Exhibits Officer. The exhibits list is located in the exhibit room, along with an exhibit movement form that must be completed when a record is accessed from the exhibit room.

9.7 Security of Documents During Extended Searches²⁵

The responses on this subject described four different procedures for ensuring that documents remain secure for searches lasting several days:

- leaving the selected documents under seal on the premises;
- a combination of removal of the selected documents and the sealing of the premises;
- removal of the selected documents on a daily basis; and,
- investigators remain on the premises until the search is done.

One agency responded that they had no procedure to ensure the security of the selected records.

9.7.1 Leaving Documents Under Seal at Premises

Five agencies mentioned that their procedure is to leave the selected documents on the premises if they can not finish the search in one day. These agencies seal up the documents, premises or devices to be searched. One agency explained its procedure in the following terms: In a situation where a search lasts more than one day, and the team leader is of the view that there is little or no risk that the seized documents will be destroyed, removed or

²⁵ **Question 20:** In the instance of a search that continues for more than a day, are the selected records removed on a daily basis? If records are not removed from the premises each day, what, if any, procedures are employed to ensure the security of the selected records?

altered, then the records are left in sealed containers at a secure area or office on the premises. Each container is labeled in terms of where on the premises the records were seized (name of individual, title, office location, name of the search officer and date). These sealed containers are placed in a document locker which is also locked and left in the area or office assigned by the business at the start of the search. That location is then sealed by the team leader and a warning poster indicating that entry is forbidden is affixed to the entrance door of the said office or area. The person in authority at the premises is also warned that the documents left at the premises are under his/her safekeeping. Search officers note the number of sealed containers left at the premises, the name of the individual responsible for the safekeeping of the sealed containers, and the time of day the officers left the premises. The following day, the search officers make a note whether there has been any tampering with the seals on the entrance door. If there has been any tampering, then search officers will make a note of the incident and report it to the lawyer advising the search team, who will determine whether or not to prosecute for obstruction.

9.7.2 Daily Removal of Documents vs. Sealing at the Premises

Twenty-one agencies stated their procedure is to remove the documents on a daily basis. If the search is not completed in a single day, some agencies stated they either sealed, or had the authority to seal cabinets, offices, areas etc. that were not searched on the first day. A number of agencies did not elaborate on their sealing procedures.

9.7.3 Keeping Search Officers at the Premises Until the Search is Completed

Three agencies mentioned that their investigators stay at the premises until the search is completed. One of the three stated that it usually removes documents on a daily basis and, if the search is not completed the first day, they can seal the premises overnight to protect the integrity of the search or, officers can remain at the search premises until the search is completed. This agency may take pictures or video of the premises before the search begins, and before leaving and upon returning each day, to ensure that there is no tampering with evidence.

9.8 Receipt for Seized Records²⁶

Fourteen agencies responded that they provide a list of the seized documents to a representative of the business searched. One agency reported it deposits the list along with the document seizures with the police, and also provides a copy of the list to the business or its legal representative.

The list may include some or all of the following information:

- the initials or signature of the officer conducting the search;
- the number of the document found in a certain office;
- document types and titles;
- date of the document;

²⁶ **Question 18:** Do you issue a receipt for records taken from the premises, either at the moment of removal or at a later time?

- author of the document;
- a brief description of the document; and,
- time and place of the seizure of the document.

Seven agencies responded that they provide the business with a copy of their search report in addition to a document list. This report may include one or more of the following: relevant comments by the business's employees, conversations with lawyers or other persons and their answers and clarifications to the questions asked by the officials, and a description of any other significant events that occurred at the premises during the search. Four of these agencies require the business representative to sign the report. Another agency provides copies of all the documents seized in addition to the search protocol/report.

One of the agencies that seizes original documents provides a receipt listing either the number of containers of records or things seized in the case, or the alpha numerical code range identifying the records seized. A copy of the receipt is also kept by the seizing officer. If the party being searched requests, and if the number of records seized is small, then photocopies of all coded records seized may be made at the search premises. If the number of documents is large, copies are made at the offices of the agency and a copying charge is levied upon the company. Eight other agencies replied that they provide a receipt, but provided no further description of the type of information recorded on the receipt. Three agencies responded that they do not provide a receipt.

9.9 Transporting Records to the Agency's Offices

It is good practice to return all seized documents to the authority's offices as soon as possible upon completion of the search and to ensure all seized materials are secured in a facility with restricted and monitored access.

One agency stated that once the document seizure is completed, all records seized at one location are transferred to one member of the team. Affidavits are prepared to document the transfer of records by the seizing officer to the appointed record holder. The records, in the sealed expandable folders, are placed in large, locked containers and are transported or shipped from the premises to the agency's office.

10 BACK AT THE AGENCY

It is good practice, where applicable, to consolidate all notes as soon as possible after the search to create a complete record of the search.

One agency reported that search officers forward copies of all statements, notes and reports to the case officer responsible for the investigation as soon as possible after the conclusion of the search and return to the agency's office. In addition, each search officer must provide his/her search memorandum and a transfer affidavit required to establish continuity of possession. The legislation governing the agency's search powers requires that when records are seized under the authority of a search warrant, a report of the records or things seized must be returned to a judge.

One agency reported that after the search has been completed, the search leader calls a meeting in which all search participants give a short oral report about the search and any particular incidents.

Another agency reported it undertakes an oral debriefing session after the search. This session is considered to be of significant benefit. It is designed partly to pull evidentiary strands of the case together for the case team and partly as a know-how exercise to discuss issues or problems that arose during the searches with a view to developing an approach to deal with such issues in future.

Another agency holds a debriefing session whereby all aspects and experience are exchanged and the conclusions are used to improve the theory of the case.

11 DEALINGS WITH COUNSEL TO PARTIES AND THE MEDIA

11.1 Parties' Lawyers

One agency reported that searching officers will nearly always be required to deal with lawyers for parties being searched. Such dealings are usually handled by the team leader who is free to discuss issues of process but will not become involved in detailed discussions about the case. Any discussions regarding legal issues such as the validity or scope of the warrant are referred to the lawyer assigned to the agency's inquiry.

11.2 Media Contacts

It is good practice to consider, before the search is carried out, what the authority's press line should be during the search (in the event that the fact that a search has taken place becomes public during or after the search).

One agency reported that searching officers are not allowed to make any contact with media representatives during the course of a search. If the media becomes aware of a search and contacts any member of a search team, the media will be referred to the designated agency spokesperson for the matter at headquarters or in the field.

APPENDIX I: AGENCIES THAT REPLIED TO THE QUESTIONNAIRE

1.	Australia	20.	Mexico
2.	Belgium	21.	Netherlands
3.	Brazil	22.	New Zealand
4.	Canada	23.	Pakistan
5.	Chile	24.	Poland
6.	Cyprus	25.	Portugal
7.	Czech Republic	26.	Romania
8.	E.U.	27.	Russia
9.	Finland	28.	Senegal
10.	France	29.	Slovak Republic
11.	Germany	30.	Spain
12.	Hungary	31.	Sweden
13.	Ireland	32.	Switzerland
14.	Israel	33.	Taiwan
15.	Italy	34.	U.K.
16.	Jamaica	35.	U.S.
17.	Japan	36.	Ukraine
18.	Korea	37.	Yugoslavia
19.	Latvia	38.	Zambia

APPENDIX 2: GOOD PRACTICES RELATING TO SEARCH AND SEIZURE

The following list reflects key practices common to many of the competition authorities responding to the SG2 survey that formed the basis for the chapter on searches, raids, and inspections. This list does not purport to present all of the possible practices, nor does it necessarily recommend these practices over others, as such a choice will depend on the circumstances particular to any given situation. The list is meant to provide a concise summary of common and widely reported practices in the conduct of Searches, Raids and Inspections.

I Pre-search intelligence and preparation

It is good practice:

1. to undertake **reconnaissance of the search** venue prior to the search day in order to understand the physical layout of the premises, potential obstacles to obtaining entry to the premises (e.g. electronic entry locks, travel time, traffic conditions).
2. if there are indications of a security risk, to conduct some type of **personnel profile** of persons expected to occupy the premises (e.g. criminal records checks for violent past offences, firearm registry checks) to minimize safety issues during the search, and assist in determining whether it is advisable in the circumstances to engage the **police**.
3. to precede searches with **briefings for team members** including, if time permits, distribution of a written briefing or 'operational order' (including search team assignments, contact numbers, a description of the premises, strategy for entry, persons likely to be at the premises and their relationship to the investigation, alleged violations of the law, description of the types of records sought, key search terms including names and dates and other relevant descriptors, and the practice to be employed to deal with potentially privileged documents).
4. to prepare a "**search kit**" ready-packed with stationery, seals (e.g. for use on doors and cabinets), and other necessities for all team members.
5. to consider, before the search is carried out, what the authority's **press line** should be during the search (in the event that the fact that a search has taken place becomes public during or after the search).
6. where permitted, to ensure the search authorization covers **moveable objects** such as briefcases, handbags, electronic diaries, and portable computers.
7. where appropriate, to communicate with relevant **foreign competition authorities** to determine whether coordination of searches is possible and to avoid conflict with other agencies' investigations (when known).

II Search Teams

It is good practice:

1. to appoint a **Team Leader** who will be responsible for the overall conduct of the search at each search premise, including serving as the liaison with the target's representatives (including legal advisors).
2. for the **officers assigned to the case to participate** in the search, and for the team to be augmented with other case officers and officers seconded from the police, as appropriate.
3. to assign an **IT Forensics Specialist** to each team unless it is clear that no electronic data will be searched.
4. to ensure that the issue of **language profile** is adequately addressed (both of the occupants and the language of documents being sought).
5. when resources permit, and having regard to the nature of the premises to be searched, to include both **male and female** personnel on search teams (particularly when a private residence is to be searched).
6. to ensure the appropriate **resources are available on a stand-by** basis to aid the search team if necessary (e.g. legal counsel, supplementary search officers, officer to draft additional search authorizations if necessary).
7. in the instance of simultaneous raids, to plan for a central "control room" or "command post" to coordinate the **sharing of emerging information and strategies** among the search teams and ensure overall **consistency of approach**.

III Entry

It is good practice:

1. to conduct searches with the **element of surprise** and ensure a **rapid entry** to the premises being searched.
2. to preserve the element of surprise during entry by **not disclosing to a receptionist** or other intermediary at the premises the precise purpose of the search team's presence until the search authorization has been served upon, or the reason for entry otherwise communicated, directly with the senior official at the premises.
3. to make **entry simultaneously** with search teams on other premises and equip each Team Leader with a mobile phone and the numbers of all other relevant team leaders to enable continuous coordination.
4. to be **courteous** and diplomatic.

IV Search in progress

It is good practice:

1. for the Team Leader, upon entering the premises, to identify the appropriate target representative, present identification, furnish a copy of the search authorization, explain the nature of the search, and caution against obstruction.
2. if acceding to a request to delay searching to allow a reasonable time for the target's legal representatives to arrive at the premises, to first ensure the premises have been adequately secured so the delay does not prejudice the outcome of the search.
3. to ensure that the search team has the power and has been trained to respond to unauthorized removal or destruction of records.
4. for the Team Leader to look for opportunities to bring any applicable leniency program to the attention of the target company and to individuals at the premises alleged to be involved in the cartel conduct.
5. to ensure that documents seized during a search are duly coded by means of affixing an identifier to each document seized and recording a description of the document on a separate list.
6. to make accurate notes of the events and occurrences as they occur at the search premises, including through the use of photos and videos, and to designate (if appropriate) who will be principal note-taker.
7. to ensure, if interviews are conducted during the search, that a strategy is in place as to who will conduct the interviews and that complete notes are made of the interview.

V Post Search

It is good practice:

1. to return all seized documents to the authority's offices as soon as possible upon completion of the search and to ensure all seized materials are secured in a facility with restricted and monitored access.
2. where applicable, to consolidate all notes as soon as possible after the search to create a complete record of the search.



International
Competition
Network

ANTI-CARTEL ENFORCEMENT MANUAL

CARTEL WORKING GROUP
Subgroup 2: Enforcement Techniques

April 2005

Chapter
Drafting and Implementing
an Effective Leniency Program

2

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1. INTRODUCTION

The purpose of this document is to draw together key points concerning the drafting and implementation of an effective leniency policy. Outlined below are a number of the issues discussed at the 2004 International Competition Network (ICN) Leniency Workshop, held in Sydney, Australia in November 2004. A copy of the Leniency Workshop Agenda is attached as Appendix 1. The materials from the Workshop are available on the ICN website at <http://www.internationalcompetitionnetwork.org/>.

2. DRAFTING AND IMPLEMENTING AN EFFECTIVE LENIENCY PROGRAM

2.1 What is Leniency?

Leniency is described in terms of immunity from, or reduction to the sanction compared to what would be sought in the absence of full, voluntary co-operation. The clearest, most complete form of leniency is amnesty. In the US program, where cartels are subject to criminal sanctions, “leniency” means immunity from prosecution. In the EC program, leniency is described in terms of reductions in fines. Other enforcement agency decisions that could be considered lenient treatment include agreeing not to refer a matter for criminal prosecution or adjudication, or not to pursue penalties against individuals.

A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process. A leniency policy is one component of a leniency program, which also includes internal agency processes, for example how the agency implements its leniency policy.

Link to Leniency Workshop sessions where these issues were discussed:

- [Session 1](#)

2.2 Why implement a leniency policy?

There are many benefits that flow from having such a policy and there are varying reasons why competition enforcement agencies have adopted them.

Some jurisdictions have developed programs that offer leniency in order to encourage violators to confess and implicate their co-conspirators with first-hand, direct “insider” evidence that provides proof of conduct parties want to conceal. The programs uncover conspiracies that would otherwise go undetected. They elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence can be obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. To get this information, the parties who provide it are promised lower fines, shorter sentences, less restrictive orders, or even complete amnesty.

The objective of all leniency programs is, through increased detection of cartels, to increase the level of compliance with antitrust or competition laws, which then benefits the community through increased competition, an objective which is consistent with that of the enforcement agency.

2.3 Prerequisites to adopting a Leniency Policy

Without strong penalties and a vigorous enforcement program by the competition enforcement agency, there is no incentive for cartel participants to self report their breach of competition laws. The corollary being that no leniency policy, no matter how generous or well drafted, will be effective unless there is fear of imminent detection and prosecution or adjudication.

First, agencies must adopt a strong enforcement program to fight cartels. Agencies have to commit to rooting out cartels and ensuring action establishing the infringement is taken. Those participating in cartels must perceive that there is a real risk of detection,

and that subsequent enforcement action will necessarily follow, in order to encourage them to come forward before they are caught.

Second, the sanctions imposed on cartel participants must be significant. If sanctions are inadequate, cartel participants will not come forward since the benefits from leniency are reduced or non-existent. Essentially, the value of the cartel for cartel participants should not be greater than the cost of getting caught.

Link to Leniency Workshop sessions where these issues were discussed:

- [Session 1](#)

2.4 Issues for consideration in drafting and implementing a successful leniency policy

There are a number of elements common to successful leniency programs. Some of the more important elements that were identified during the Workshop are listed below, although not all elements are present in all leniency programs in all jurisdictions.

- Immunity, depending upon the criteria being met, is granted to the first eligible leniency applicant who self reports its involvement in a cartel
- Provision for an anonymous leniency application in order to allow an applicant to discuss particular circumstances of a case and the availability of leniency in these circumstances
- Provision for amnesty for the first eligible applicant to submit an application after an investigation has begun
- Lenient treatment, or less than full amnesty for second and subsequent applicants
- “Amnesty Plus” encourages subjects and targets of ongoing investigations to consider whether they may qualify for amnesty in other markets where they compete. Pursuant to the Amnesty Plus policy, a company that does not qualify for amnesty for the initial matter under investigation but discloses a second cartel and meets the amnesty program requirements will receive amnesty for the second offense and a substantial additional reduction in the calculation of the fine for its participation in the first offense.
- The “Penalty Plus” policy provides that if a company participated in a second antitrust offense and does not report it under the Amnesty Plus policy, enforcers will urge the sentencing authority to consider the company's and any culpable executives' failure to report the conduct voluntarily as an aggravating sentencing factor.
- “Affirmative Amnesty” or the practice of a competition agency approaching a company – who may at the time not even know that it or its competitors are under investigation – to cooperate and seek amnesty
- A “marker” system or the practice of reserving a place for applicants whilst they conduct further internal investigations and attempt to perfect their application for leniency prior to the agency determining the first eligible applicant

- Full and frank disclosure of requisite information or evidence by the applicant to be eligible for, or sustain an application for amnesty
- Ongoing requirement for the applicant to cooperate fully after conditional acceptance into the leniency program
- Applicant to cease participation in the cartel conduct unless instructed otherwise by the enforcement agency, who is authorised to do so by law
- Applicant not to have coerced others, instigated the cartel, or acted as ringleader; and
- Applicant to make restitution to injured parties

Links to Leniency Workshop sessions where these issues were discussed:

- [Session 1](#)
- [Session 2](#)
- [Session 7](#)
- [Examples of leniency policies](#)

2.5 Disincentives to avoid in drafting and implementing a leniency policy

When drafting and implementing a leniency policy, it is important for an agency to not only consider whether its program has the right incentives, but also whether its program contains any disincentives preventing cartel participants from self-reporting their cartel conduct.

A panel of Non-Governmental Advisors (NGAs) from Australia, Canada, the European Union, Korea and the United States, who regularly represent amnesty applicants, discussed the disincentives that inhibit potential amnesty applicants from self-reporting. The major disincentives identified included:

- Absence of a marker system;
- Absence of automatic amnesty for first applicant to self report before an investigation;
- Uncertainty about a company's ability to obtain amnesty after an investigation has commenced;
- Possible disclosure to other enforcement agencies or third parties without the applicant's approval;
- Absence of "amnesty plus" credit;
- Discoverability of information and documents produced in the jurisdiction where leniency is granted;
- Lack of standard form letters setting out obligations and protections for both the applicant and the enforcement agency; and

- Requirement to submit written leniency applications

Link to Leniency Workshop sessions where these issues were discussed:

- [Session 7](#)

2.6 Practical Issues

2.6.1. Making an application for leniency

Leniency applications are based on a model whereby cartel participants self report their conduct in exchange for lenient treatment. There are two common approaches:

- 'First through the door' policy whereby the first eligible applicant is given a marker regardless of the quality of evidence before the agency has commenced an investigation into the cartel. The applicant must later perfect its application by providing more detailed evidence to support a grant of amnesty (US & Canada). Leniency may also be available for the first eligible applicant after an investigation has commenced if the applicant satisfies additional evidentiary requirements; and
- An application based on the decisiveness of the evidence, for example enabling an enforcement agency to conduct dawn raids (EC).

The question of dealing with second, subsequent and amnesty plus applicants and whether they will be rewarded under a leniency program is also an issue that must be considered. Some jurisdictions also have the practice of suggesting that applicants approach other jurisdictions with leniency policies.

Links to Leniency Workshop sessions where these issues were discussed:

- [Session 4](#)
- [Session 5](#)
- [Session 6](#)
- [Session 7](#)

2.6.2. Form of the application for leniency

There are essentially two forms of leniency applications:

- Written (Australia); and
- Oral (US, Canada, EC).

A subset of these forms of application is the “hypothetical” application (US, Canada, EC). All three forms have been successfully implemented by various jurisdictions. An important consideration in deciding which form to implement is the enforcement agency’s ability to protect the application (if written) and any information provided by the applicant in support of its leniency application.

Links to Leniency Workshop sessions where these issues were discussed:

- [Session 4](#)
- [Session 5](#)
- [Session 6](#)
- [Session 7](#)

2.6.3. Protection of information provided by leniency applicant

With the threat of exposure to private civil actions, ensuring confidentiality of supporting material will provide comfort to applicants. It is in this context that some enforcement agencies allow for hypothetical or oral only leniency applications.

The protection of information is necessary to allay any fears that such information may be used against the applicant in private civil actions or shared with another government agency, foreign or domestic, who may use that information against the applicant.

Links to Leniency Workshop sessions where these issues were discussed:

- [Session 4](#)
- [Session 5](#)
- [Session 6](#)

2.6.4. Implementation of leniency decisions

In many of the leniency models across jurisdictions, the final implementation of leniency decisions does not usually take place until the end of the enforcement process.

After an applicant is determined to be eligible for leniency, the agency usually offers the applicant conditional immunity, which is contingent on the applicant satisfying the other ongoing requirements of the policy, which most usually include cooperation with the enforcement agency in its investigation and prosecution or adjudication of other cartel participants.

In some jurisdictions the application is then perfected or implemented after any relevant enforcement action has been completed.

2.6.5. Responsibility for the program within the agency

A clear contact point for applicants was considered essential for an effective leniency program. This can be achieved in a number of ways, including by designating a responsible individual or establishing a dedicated cartel unit. Having an individual responsible for administering the program may enhance the transparency and consistency in the application of the leniency policy and processes.

Whatever method the agency chooses, the overarching goal is to ensure consistent, predictable and transparent implementation of the leniency policy.

Links to Leniency Workshop sessions where these issues were discussed:

- [Session 1](#)
- [Session 2](#)
- [Session 3](#)
- [Session 4](#)
- [Session 5](#)
- [Session 6](#)
- [Session 7](#)

2.6.6. Making leniency work in a bifurcated enforcement model

A bifurcated enforcement model typically refers to the situation where the investigative or administrative and prosecutorial or adjudicative roles are divided between two different agencies. Bifurcation of responsibilities in respect of cartel matters can introduce some unpredictability and uncertainty regarding the leniency policy, particularly the application and decision-making process. These effects can be minimised by, among other things, ensuring that agencies have consistent leniency policies, shared priorities, and open and constant communication.

Link to Leniency Workshop sessions where these issues were discussed:

- [Session 1](#)

2.6.7. Clear requirements about the applicants' obligations to cooperate

Ensuring ongoing cooperation from a leniency applicant will enable the enforcement agency to complete its investigation and any associated prosecution or adjudication. To assist in managing this issue, some agencies have adopted a number of approaches, including:

- Clear description of the requirements for full cooperation, which then need to be communicated to applicants;
- Clear and concise standard form letters and protocols; and
- Preparedness to deal with non-compliance with the cooperation requirements, such as by withdrawing amnesty or filing obstruction of justice charges.

Agencies typically demand complete and continuing co-operation from firms and individuals seeking leniency. Further investigation will be needed to track down all the participants and assemble the necessary formal evidence. Leniency applicants are particularly well placed to assist in that process. In addition, the agencies want to avoid the risk that a leniency applicant will change its mind and repudiate its original confession.

Some jurisdictions have a conditional leniency system, which requires ongoing cooperation throughout the course of the investigation and prosecution or adjudication. Depending on the leniency program, the enforcement agency may be free to use all information obtained from a former applicant in the investigation and prosecution or adjudication of the cartel.

Links to Leniency Workshop sessions where these issues were discussed:

- [Session 1](#)
- [Session 2](#)
- [Session 3](#)
- [Session 4](#)
- [Session 5](#)
- [Session 6](#)
- [Session 7](#)

2.6.8. Leniency as an investigatory tool

There is no doubt that, given the right environment, a leniency policy can be an efficient and effective means of detecting, investigating, and prosecuting or adjudicating cartel conduct.

Some jurisdictions are authorised to go further by asking, but not requiring, leniency applicants to continue their conduct to enable them to collect information about their co-conspirators, for example by recording meetings or telephone conversations or providing information to enable an agency to utilise its evidence gathering powers, such as searches or wiretaps

Links to Leniency Workshop sessions where these issues were discussed:

- [Session 1](#)
- [Session 2](#)
- [Session 3](#)
- [Session 4](#)
- [Session 5](#)
- [Session 6](#)
- [Session 7](#)

APPENDIX 1: ICN WORKSHOP ON LENIENCY PROGRAMS

Session 1: Panel Discussion: Prerequisites for an effective leniency program

- An anti-cartel enforcement regime with two critical features: heavy sanctions for violations and sufficient investigative resources to create a high risk of detection
- Overcoming institutional resistance to adopting a leniency program including strategies for winning over sceptics within one's government, private bar, business community, and society
- Coordination between authority with power to investigate cartel offences and authority with power to promise and grant leniency for cartel offences

Moderator:

Lee Hollis (AU CCC)

Panellists:

Scott Hammond (US DOJ)	Cornerstones of an Effective Leniency Policy
Simon Williams (UK OFT)	Introducing a leniency policy – overcoming the sceptics
Philip Palmer (Canada DOJ)	Making Leniency Work: Living with Bifurcation - Delivering a Leniency Program where Prosecutors and Investigators are in Separate Agencies

Session 2: Panel Discussion: Drafting and implementing an effective leniency program

- Overview of issues pertaining to drafting and implementing leniency programs, including discussion by panellists of avoiding disincentives and difficult issues that arise in interpreting conditions for granting leniency

Moderator:

Georg DeBronett (EC)

Panellists:

Gina Cass-Gottlieb (NGA AU)

Phil Warren (US DOJ)

- Targeting Industries for Cartel Enforcement
- US Corporate Leniency Policy
- US Individual Leniency Policy
- Model Corporate Conditional Leniency Letter
- Model Individual Conditional Leniency Letter
- Answers to Recurring Questions about Leniency
- Making Companies an Offer they Should Not Refuse
- Detecting and Deterring Cartel Activity
- How Do You Put a Price Tag on an individual's freedom?
- Transparency in Enforcement
- US Antitrust Primer

Emil Paulis (EC)

- Drafting and Implementing an Effective Leniency Program

Bruce Cooper (AU CCC)

- Development, implementation and proposed areas for review

Session 3: Luncheon Speaker: International Cartel Enforcement And Leniency Programs: A Global Perspective

Gary Spratling (NGA US)

- International Cartel Enforcement And Leniency Programs: A Global Perspective

Session 4: Demonstration: The organization decides whether to seek amnesty and, if so, where

- Demonstration will provide an inside look as a company considers the questions of whether to self report and seek leniency and, if so, which jurisdictions to approach for amnesty. Experienced defense counsel from multiple jurisdictions will:
 - (1) assess the advisability of seeking amnesty in one or more jurisdictions;
 - (2) identify the business and ethical considerations that arise in the context of deciding whether or not to report; and
 - (3) develop an integrated strategy for coordinating applications for leniency in multiple jurisdictions.

Moderator:

- Randal Hughes (NGA Canada)
- Scenario
 - The Jordanites Cartel In A Nutshell

Participants:

Gina Cass-Gottlieb (NGA AU)

John Ratliff (NGA EC)

Gary Spratling (NGA US);

Sai Ree Yun (NGA Korea)

Session 5: Demonstration: The application for leniency by an organization before an investigation begins

- Demonstration of negotiation process in which corporate amnesty applicant approaches USDOJ seeking leniency and the interaction between the parties that leads to the issuance of a conditional leniency letter. Hypothetical fact pattern will highlight key issues that arise in application process.

Participants:

Duncan Currie (US DOJ)

Gary Spratling (NGA US)

- Demonstration to be followed by panel discussion which will identify key similarities and differences in application process used in other jurisdictions.

Moderator:

Michael Sullivan (Canada CB)

Panellists:

Felix Engelsing (Germany)

Scott Hammond (US DOJ)

Session 6: The application for leniency by an organization after an investigation begins

- Demonstration of process in which organization approaches competition authority as the first organization to offer cooperation and seek leniency after an investigation has been opened.

Moderator:

Georg De Bronett (EC)

- Factual Scenario
- Summary of Demonstration

Participants:

Randal Hughes
(NGA Canada)

- Competition Act – Part VI – Offences in relation to competition
- CCB 'Immunity Program under the Competition Act'
- CCB Immunity Program – Frequently Asked Questions

Sam Pieters (EC)

John Ratliff (NGA EU)

- Demonstration to be followed by panel discussion which will address how different jurisdictions handle issues such as leniency applications after an investigation begins, and reductions and calculation of fines for companies who offer cooperation after the initial leniency applicant.

Moderator:

Terry Calvani (Ireland)

- Summary of demonstration

Panellists:

Joseph Seon Hur (Korea FTC)

Frank Vondrak (US DOJ)

Session 7: Panel Discussion: Avoiding disincentives in leniency programs

- Identification and discussion of issues that can negatively impact decisions to self report and cooperate

Moderator:

- Gary Spratling (NGA US)
- Federal Sentencing Guidelines – Antitrust Offenses (2003)
 - Guidelines Manual – Sentencing of Organizations (2003)

Panellists:

- Gina Cass-Gottlieb (NGA AU)
- Summary of disincentives
 - ACCC Cooperation Policy
 - ACCC Leniency Policy
 - Trade Practices Act 1974 s45, s45A, s4D
 - Trade Practices Commission v CSR (1991)
- Scott Hammond (US DOJ)
- Randal Hughes (NGA Canada)
- John Ratliff (NGA EU)
- The European Commission’s 2002 Leniency Notice after one year of Operation
 - Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty (98/C 9/03)
 - Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03)
- Sai Ree Yun (NGA Korea)
- Top Ten Disincentives for Leniency Application in Korea

APPENDIX 2: LIST OF COMPETITION ENFORCEMENT AGENCIES WITH LENIENCY POLICIES

Please note: this list is provided for reference only and you should ensure that the policies are the official versions before relying on them. This list is not comprehensive as it only sets out the links to some competition agencies with leniency policies.

For further information about those countries with a leniency program please see these two links:

Authorities with Leniency Programmes 1

http://www.europa.eu.int/comm/competition/antitrust/legislation/authorities_with_leniency_programme.pdf

In order to obtain the list from this second site, choose Leniency/Immunity and check the box for ALL and you will get a list and description of the leniency programs in various jurisdictions.

Authorities with Leniency Programmes 2

http://www.gettingthedealthrough.com/main_fs.cfm?book=Cartel_Regulation

Australia - Australian Competition and Consumer Commission (ACCC)

ACCC's Leniency Policy for Cartel Conduct

<http://www.accc.gov.au/content/item.phtml?itemId=454181&nodeId=file42377fc4d150e&fn=ACCC>

Canada - Canadian Competition Bureau (CCB)

Immunity Program

[http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwapj/immunitye.pdf/\\$FILE/immunitye.pdf](http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwapj/immunitye.pdf/$FILE/immunitye.pdf)

Frequently Asked Questions

<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02312e.html>

Brazil – Conselho Administrativo de Defesa Economica (CADE)

Leniency Program

http://www.fazenda.gov.br/seae/english/index_english.html

Europe - EC DG Competition

Commission Notice on the non-imposition or reduction of fines in cartel cases (96/C207/04)

http://europa.eu.int/comm/competition/antitrust/legislation/96c207_en.html

Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty (98/C 9/03)

http://europa.eu.int/eurlex/pri/en/oj/dat/1998/c_009/c_00919980114en00030005.pdf

Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03)

http://europa.eu.int/eurlex/pri/en/oj/dat/2002/c_045/c_04520020219en00030005.pdf

Germany – Bundeskartellamt**Leniency Policy**

<http://www.bundeskartellamt.de/wEnglisch/FurtherInfo/leniency.shtml>

Hungary – Hungarian Competition Authority**Leniency Policy**

<http://www.gvh.hu/index.php?id=3371&l=e>

Ireland - Irish Competition Authority**Immunity Policy**

<http://www.tca.ie/immunity.html>

Korea - Korean Fair Trade Commission (KFTC)**Leniency Program**

http://ftc.go.kr/data/hwp/leniency_program.doc

The Netherlands – Nederlandse Mededingingsautoriteit (NMa)**Leniency Policy**

http://www.nmanet.nl/en/nieuws_en_publicaties/publicaties/leniency.asp

United Kingdom – Office of Fair Trading (OFT)**United Kingdom Leniency Policy - General guidance on leniency**

<http://www.offt.gov.uk/NR/rdonlyres/CC73E8F4-2433-48C4-A3BC-5F3255C58AAF/0/oft436.pdf>

United Kingdom Leniency Policy - Leniency and the calculation of penalties

<http://www.offt.gov.uk/NR/rdonlyres/4546166B-0413-45E4-8C8F-208CC3CDC325/0/OFT423.pdf>

United States of America - Antitrust Division, US Department of Justice (DOJ)**Corporate Amnesty Program**

<http://www.usdoj.gov/atr/public/guidelines/0091.htm>

Individual Amnesty Program

<http://www.usdoj.gov/atr/public/guidelines/0092.htm>